IN THE HIGH COURT OF DELHI

FAO No.320/2007

Mr.Sunder Shyam Singh .....Appellant
! through: Mr.Rajeev Kumar, Adv.

VERSUS

$ Miss Sujata Singh @
Sukhwant Kaur & Anr. ..... Respondents
^ through: Mr.S.D.Dixit, Adv.

% DATE OF DECISION: 15.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**(Oral)
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1. Petitioner is aggrieved by the order dated 3.2.2007 as also the order dated 17.4.2007 passed by the learned Trial Judge.

2. Being defendant petitioner was proceeded ex-parte and suffered an ex-parte decree on 5.5.2006. He filed an application under Order 9 Rule 13 CPC on 19.8.2006 praying that for the reasons stated in the application the ex-parte

decree be set aside. An application under Section 5 of the

Limitation Act was filed accompanying the application under Order 9 Rule 13 CPC setting out the grounds on which the appellant wanted to show sufficient cause entitling him to the setting aside of ex-parte decree.

3. Vide order dated 13.2.2007 learned Trial Judge dismissed the application filed by the appellant under Order 9 Rule 13 CPC. He filed an application for review pointing out that his application seeking delay to be condoned was not considered. He pointed out that his application under Order 9 Rule 13 CPC was dismissed vide order dated 3.2.2007 on account of delay. He stated that if his application under Section 5 was allowed, delay in preferring the application under Order 9 Rule 13 CPC would be condoned and in said eventuality, he would be entitled to a fair consideration on merits of his application. The review application was taken up along with application filed by the appellant under Section 5 of the Limitation Act. Both were dismissed vide order dated 17.4.2007.

4. At first blush it appears that the learned Trial Judge has apparently committed a technical error pertaining to the stage at which applications have been decided, but a deeper look shows that no error has been committed for the reason

facts pleaded in the application under Order 9 Rule 13 CPC were pari materia with the facts pleaded in the application under Section 5 of the Limitation Act.

5. Relevant facts as can be culled out from the record of the learned Trial Judge are that the wife filed a suit seeking permanent alimony against the appellant. The suit was filed on 9.1.1998. With great difficulty appellant was served for 1.7.2001. He chose not to appear. He was proceeded against ex-parte. He moved an application under Order 9 Rule 7 CPC which was allowed on 2.4.2003. He was permitted to file his defence and participate in the proceedings. The suit filed by the wife came to be transferred to a different court on 6.11.2004 notifying that the matter would be taken up on 9.11.2004 before the transferee court. When said order was passed counsel for the appellant was present. Meaning thereby appellants counsel had notice of the date when transferee court had to hear the matter. But none appeared before the transferee court with the result that on 2.3.2005 the transferee court proceeded ex-parte against the appellant. Ex-parte proceedings continued till decree was passed on 5.5.2006.

6. According to the appellant he had lost contact with his lawyer and for 2 days was in judicial custody. He pleaded

that he learnt about his being proceeded against ex-parte only on 11.8.2006 and that thereafter the application under Order 9 Rule 13 CPC as also Section 5 of the Limitation Act was drafted and filed.

7. As recorded in the orders which have been challenged, a fact which is borne out from the record of the learned Trial Judge is that the appellant had inspected the court record on 27.1.2006. On said date, i.e. 27.1.2006, the matter had already been adjourned for further hearing on 17.2.2006. This date was mentioned by the appellant on the inspection form. Therefrom, the learned Trial Judge has concluded that the appellant was aware of 17.2.2006 being the next date of hearing when he inspected the court record on 27.1.2006. Learned Judge also opined that having inspected the court record appellant would be in the knowledge of the fact that on 2.3.2005 he was proceeded against ex-parte. Thus, his assertion in the 2 applications that he learnt about his being proceeded against ex-parte on 11. 8.2006 is not correct.

8. The inevitable conclusion therefrom would be that both for purposes of limitation as also showing sufficient cause for not appearing when decree was passed appellant would have no case whatsoever.

9. Thus, I find no infirmity in either order dated 3.2.2007 or in the order dated 17.4.2007.

10. I clarify that if delay is not to be condoned in filing application under Order 9 Rule 13 CPC I need not even look to the order dated 3.2.2007.

11. The appeal is without merits.

12. It is dismissed.

13. LCR be returned forthwith.

November 15, 2007 **PRADEEP NANDRAJOG, J.**
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